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March 3, 2023

By ECF

Honorable Jennifer H. Rearden  
United States District Judge  
Southern District of New York  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl St.  
New York, NY 10007-1312

Re: *Virtu Financial, Inc. v. U.S. Securities and Exchange Commission,*  
1:22-cv-10088-JHR (S.D.N.Y.)

Dear Judge Rearden:

We respectfully submit this letter on behalf of the parties in the above-referenced action in response to the Court's February 17, 2023 Order (Dkt. 15) requesting a joint status update. Set forth below are joint responses to the Court's specific requests for information.

1. Counsel for Plaintiff, Virtu Financial, Inc. is as follows:

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2. On November 29, 2022, Plaintiff, a global market maker and financial services firm, filed this action against the U.S. Securities and Exchange Commission (“SEC”). The complaint alleges that the SEC violated the Freedom of Information Act (“FOIA”) by failing to timely and reasonably respond to Plaintiff’s June 2022 FOIA request seeking documents and information regarding the SEC’s communications with certain third parties concerning retail stock order handling and execution. *See* Compl. ¶¶ 1–3. Plaintiff seeks declaratory and injunctive relief, as well as reasonable attorneys’ fees and litigation costs under 5 U.S.C. § 552(a)(4)(E). *Id.* at 13. On January 9, 2023, the SEC answered Plaintiff’s complaint and asserted affirmative defenses.

Plaintiff alleges that it is seeking documents and information pursuant to the FOIA so that it can better understand the rulemaking process associated with four recently proposed rules regulating the retail securities market and to allow Plaintiff to more effectively engage in the public comment period for those rules, which ends on

March 31, 2023. *See* Compl. ¶ 3. Plaintiff alleges that the SEC has not provided any meaningful production of documents to date. On the contrary, Plaintiff alleges that the SEC has engaged in a pattern of stonewalling and delay.

The SEC denies that it has improperly withheld documents or engaged in stonewalling. Moreover, the SEC disputes Plaintiff's argument that the timing of the rulemaking described above should bear on the processing of the FOIA request in this litigation. The SEC's position is that such a consideration is not relevant under the FOIA, and Plaintiff has not requested expedited treatment of its request. *See* 17 C.F.R. § 200.80(d)(7). Plaintiff notes that it was not entitled to request expedited treatment under the circumstances of this case (i.e. no imminent threat to an individual's life or physical safety and Virtu is not primarily engaged in disseminating information).

3. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B). Compl. ¶ 12. Venue is likewise proper under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e). *Id.* ¶ 13. Plaintiff's principal place of business is in this District; Defendant is an agency of the United States. *Id.*
4. There are no existing deadlines, due dates, or cut-off dates, except that, as further explained in paragraph 9 below, the parties have agreed to criteria for the review of potentially responsive emails with a rolling production to begin on or about March 9, 2023. The SEC estimates that the production will be completed within seven months.
5. There are no previously scheduled conferences or arguments.
6. There are no outstanding motions.
7. There are no pending appeals.

8. No discovery has taken place. It is the SEC's position that discovery is not warranted in this litigation, and even if it was, could not occur until the Court considers summary judgment motions. *See DiGirolamo v. Drug Enforcement Admin.*, No. 1:15-cv-5737, 2017 WL 4382097, at \*8 (S.D.N.Y. Sept. 29, 2017) (“[D]iscovery relating to the agency's search and the exemptions it claims for withholding records generally is unnecessary if the agency's submissions [at summary judgment] are adequate on their face”) (citing *Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). Plaintiff reserves the right to take appropriate discovery.
9. No settlement discussions have taken place. The parties have, however, had discussions concerning the outstanding FOIA request. Plaintiff agreed to criteria for production of text messages from the mobile devices of nine SEC custodians. The SEC completed this search, did not find responsive text messages for seven of the custodians, and produced all responsive text messages for the remaining two custodians, with portions redacted pursuant to FOIA Exemption 6. Plaintiff notes this consisted of a total of 18 pages and was limited to documents already in Plaintiff's possession. With respect to email, Plaintiff has agreed to narrow its initial request and proceed with the production of responsive emails outside the SEC's “Complex Track.” *See* 17 C.F.R. § 200.80(d)(4). The SEC has informed Plaintiff that it intends to begin processing 500 pages of documents per month and produce responsive documents on a rolling basis over the next seven months starting approximately on March 9, 2023, subject to the agency's further determinations for responsiveness and applicable exemptions under FOIA. The SEC also informed Plaintiff that it may be

able to process more than 500 pages of documents a month depending on the extent to which the documents contain material subject to applicable FOIA exemptions.

10. The parties have not discussed alternative dispute resolution mechanisms, nor do we believe it is necessary to do so at this time while the parties attempt to make progress on production of a narrowed set of documents.

11. The SEC states that it does not expect that a trial will be necessary to resolve the litigation. Plaintiff states that any trial in this matter is likely to require approximately two to three days.

12. At this time, the parties believe that this case does not raise any dispositive or novel issues.

Respectfully,

/s/ Lorin L. Reisner  
Lorin L. Reisner

/s/ Michael S. Bailey  
Michael S. Bailey

cc: Counsel of record (by ECF)